(43) (44)

Nos. 91-744 and 91-902

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners and Cross-Respondents,

—v.—

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents and Cross-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

LINDA J. WHARTON
CAROL E. TRACY
Women's Law Project
125 South Ninth Street
Suite 401
Philadelphia, Pennsylvania 19107
(215) 928-9801

KATHRYN KOLBERT
(Counsel of Record)
JANET BENSHOOF
LYNN M. PALTROW
RACHAEL N. PINE
ANDREW DWYER
ELLEN K. GOETZ
STEVEN R. SHAPIRO
JOHN A. POWELL
American Civil Liberties Union Foundation
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioners and Cross-Respondents

(Counsel continued on inside cover)

SETH KREIMER
University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 898-7447

ROGER K. EVANS
EVE W. PAUL
DARA KLASSEL
Planned Parenthood Action
Fund, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THIS COURT MUST REJECT THE COMMONWEALTH AND SOLICITOR'S PLEA TO ABANDON *ROE*'S CENTRAL HOLDING 1

A. *Roe* Held that the Right to Abortion Is a Fundamental Right Protected by the Strict Scrutiny Standard of Review; This Court Cannot Uphold the Pennsylvania Law Without Abandoning that Standard 1

B. The Doctrine of *Stare Decisis* Requires Reaffirmation of *Roe* 4

C. The Decision To Terminate or Continue a Pregnancy Must Continue To Be Afforded Fundamental Constitutional Protection ... 5

II. THE PENNSYLVANIA STATUTE IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW 12

A. The Factual Findings of the District Court Are Relevant to the Constitutional Issue Before This Court and Are Fully Supported by the Factual Record..... 12

B. This Court Should Reject the Commonwealth's "Rights by Numbers" Approach and Find Unconstitutional the Husband Notification Provision..... 14

PAGE

C. The Biased Counseling Provisions Will Harm Women and Force Physicians To Disseminate Pennsylvania's Anti-abortion Ideology 18

1. The biased counseling provisions interfere with the provision of appropriate medical care 18

2. The biased counseling required by § 3205 is not commercial speech 20

D. The Judicial Bypass Procedure Does Not Cure the Constitutional Defects of the Act's Informed Parental Consent Provision 23

CONCLUSION 24

APPENDIX A-1

TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 12

Arizona v. Rumsey, 467 U.S. 203 (1984) 4

Beal v. Doe, 432 U.S. 438 (1977) 2

Bellotti v. Baird, 428 U.S. 132 (1976) 3

Bellotti v. Baird, 443 U.S. 622 (1979) 15

Bigelow v. Virginia, 421 U.S. 809 (1975) 21

Board of Trustees v. Fox, 492 U.S. 469 (1989) 21

Bolling v. Sharpe, 347 U.S. 497 (1954) 7, 8

Brandenburg v. Ohio, 395 U.S. 444 (1969) 16

Brown v. Board of Educ., 347 U.S. 483 (1954) 8

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 2, 9, 10

Carrington v. Rash, 380 U.S. 89 (1965) 16

Carter v. Sedgwick County, 929 F.2d 1501 (10th Cir. 1991) 11

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) .....*passim*

Colautti v. Franklin, 439 U.S. 379 (1979) 14

Connecticut v. Menillo, 423 U.S. 9 (1975) 3

DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) 8

PAGE

Eisenstadt v. Baird, 405 U.S. 438 (1972) 6, 8, 10, 17

Eu v. San Francisco Democratic Comm., 489 U.S. 214 (1989) 2

Geduldig v. Aiello, 417 U.S. 484 (1974) 18

Gideon v. Wainwright, 372 U.S. 335 (1963) 8

Griswold v. Connecticut, 381 U.S. 479 (1965) 6, 8, 9

H.L. v. Matheson, 450 U.S. 398 (1981) 15

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 7, 8

Harris v. McRae, 448 U.S. 297 (1980).....2, 3, 8

Hernandez v. New York, 111 S. Ct. 1859 (1991)..... 12

Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560 (1991) 4

Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) .....*passim*

Hudson v. McMillian, 112 S. Ct. 995 (1992).....7-8, 9

Hunter v. Underwood, 471 U.S. 222 (1985)..... 7

International Union, U.A.W. v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991)..... 18

Jane L. v. Bangerter, No. 91-C-345-G (D. Utah filed Apr. 4, 1991) 16

Kirchberg v. Feenstra, 450 U.S. 455 (1981) 18

Lamprecht v. FCC, No. 88-1395, 1992 U.S. App. LEXIS 1997 (D.C. Cir. Feb. 19, 1992)..... 14

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 14

Lindsey v. Normet, 405 U.S. 56 (1972)..... 8-9

Lochner v. New York, 198 U.S. 45 (1905)..... 4, 5

PAGE

Loving v. Virginia, 388 U.S. 1 (1967) 8

Maher v. Roe, 432 U.S. 464 (1977) 2, 3, 19

Marks v. United States, 430 U.S. 188 (1977)..... 2

McCabe v. Atchison, T. & S. F. Ry., 235 U.S. 151 (1914) 16

McDaniel v. Paty, 435 U.S. 618 (1978)..... 16

McLaughlin v. Florida, 379 U.S. 184 (1964) 8

Meyer v. Nebraska, 262 U.S. 390 (1923) 16

Michael H. v. Gerald D., 491 U.S. 110 (1989)..... 6

Michael M. v. Superior Court, 450 U.S. 464 (1981) .. 8

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 10

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 15

NAACP v. Button, 371 U.S. 415 (1963).....20-21, 22

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 11, 18

National Railroad Passenger Corp. v. Florida, 929 F.2d 1532 (11th Cir. 1991) 11

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 21

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)..... 18

Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990) 13

Olmstead v. United States, 277 U.S. 438 (1928)..... 10

Payne v. Tennessee, 111 S. Ct. 2597 (1991)..... 4

PAGE

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 3, 14, 16-17

Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) 3, 14

Poe v. Ullman, 367 U.S. 497 (1961) 21

Regina v. Sims, 75 Eng. Rep. 1075 (Q.B. 1601)..... 6-7

Rex v. Lichefeld, K.B. 27/974, Rex. m.4 (1505)..... 6

Rhodes v. Chapman, 452 U.S. 337 (1981) 8

Riley v. National Fed'n of the Blind, Inc., 487 U.S. 781 (1988) 20, 21

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) 14

Schweiker v. Gray Panthers, 453 U.S. 34 (1981) 11

Shapiro v. Thompson, 394 U.S. 618 (1969)..... 8

Shelley v. Kraemer, 334 U.S. 1 (1948)..... 10

Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. 501 (1991) 21

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 8

Stanley v. Georgia, 394 U.S. 557 (1969)..... 10

Stanley v. Illinois, 405 U.S. 645 (1972)..... 8

Taylor v. Louisiana, 419 U.S. 522 (1975)..... 8

Texas v. Johnson, 491 U.S. 397 (1989)..... 16

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) ..... *passim*

PAGE

Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891) 10

United States v. Salerno, 481 U.S. 739 (1987)..... 13

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)..... 21

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) 2, 3, 13

Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987) 4

West Virginia State Bd. of Educ. v. Barnette, 318 U.S. 624 (1943) 22

Wooley v. Maynard, 430 U.S. 705 (1977) 22

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 21-22

Statutes and Rules:

Comstock Act, ch. 258, § 1, 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. § 1461 (1988)) 6

18 Pa. Cons. Stat. Ann. § 3204(c) (Supp. 1991)..... 11

18 Pa. Cons. Stat. Ann. § 3205 (Supp. 1991) 19

18 Pa. Cons. Stat. Ann. § 3209 (Supp. 1991) ..... *passim*

Fed. R. Civ. P. 52(a) 12, 13

PAGE

Articles:

Walter Dellinger and Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. Pa. L. Rev. 83 (1989) 11

James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978) 7

J. Reed, *The Birth Control Movement and American Society: From Private Vice To Public Virtue* (1983) 6

Jeb Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989) 5

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 5

ARGUMENT

I. THIS COURT MUST REJECT THE COMMONWEALTH AND SOLICITOR'S PLEA TO ABANDON *ROE*'S CENTRAL HOLDING.

A. *Roe* Held that the Right to Abortion Is a Fundamental Right Protected by the Strict Scrutiny Standard of Review; This Court Cannot Uphold the Pennsylvania Law Without Abandoning that Standard.

Apparently mindful of the potential negative political repercussions of a decision explicitly overruling *Roe v. Wade*, 410 U.S. 113 (1973), the Commonwealth contrives to avoid that result by arguing that the Pennsylvania law "comports with *Roe* in all respects." R.B. 35.[1] In support of this argument, the Commonwealth claims that *Roe* establishes only a "limited" right to abortion, R.B. 35-39, and that Justice O'Connor's undue burden test[2] is the standard of review mandated by *Roe*. R.B. 42-48.[3] Thus, the Commonwealth claims, this Court need not overrule *Roe* to uphold the Pennsylvania restrictions. R.B. 35.[4]

The Commonwealth's argument misstates *Roe*'s holding and, if accepted, would dismantle this Court's substantive due process jurisprudence. This Court has repeatedly found

---

1 Petitioners cite the Brief for Respondents as "R.B. ___," the Brief for Petitioners as "P.B. ___," and the Brief of *Amicus* United States as "S.G. ___."

2 *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 461-64 (1983) (O'Connor, J., dissenting); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 828-29 (1986) (O'Connor, J., dissenting).

3 The Commonwealth's argument is inconsistent with that made by all of its supporting *amici*, who concede that *Roe* held that the right to choose abortion is a fundamental right protected by strict scrutiny. *E.g.*, S.G. 5; Feminists for Life Br. 3.

4 Alternatively, the Commonwealth, joined by the Solicitor, argues that this Court should explicitly overrule *Roe* and replace the strict scrutiny standard of review with the rational basis test. R.B. 105-17; S.G. 8-18.

that once a liberty interest rises to the level of a "fundamental right," restrictions on that right are subject to the strict scrutiny standard of review. *See, e.g., Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989).[5] This Court has also repeatedly acknowledged that *Roe* established the right to choose abortion or childbirth as a fundamental right; state laws that intrude upon these reproductive decisions must therefore be examined with exacting scrutiny. 410 U.S. at 153-55.[6]

The Commonwealth's assertion that this Court can avoid overruling *Roe* by applying the "undue burden" test is disingenuous at best. As the Commonwealth concedes, that test, which presently has "the support of only a single Justice," R.B. 52,[7] provides far less protection for women seeking abortion than *Roe*'s strict scrutiny standard. *See* P.B. 35-36.[8]

5 The Commonwealth confuses fundamental rights with limited state interests. *Roe*'s accommodation of the state's interest in potential human life did not reduce the status of the abortion right to that of a so-called "limited right" and thereby sanction the imposition of a less protective standard of review. *See* R.B. 36-39. To the contrary, those concerns relate only to whether a state's interest is sufficient to override a woman's right to choose abortion. 410 U.S. at 163-64.

6 *E.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Thornburgh*, 476 U.S. at 772; *Akron*, 462 U.S. at 419-20 & n.1.

7 Relying on *Marks v. United States*, 430 U.S. 188 (1977), the Commonwealth insists that the undue burden test became the "governing standard" in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). R.B. 53. But in *Webster*, Justice O'Connor's decisive opinion found Missouri's viability testing provision consistent with *Roe*'s strict scrutiny standard and expressly declined to reexamine *Roe*'s validity. *Webster*, 492 U.S. at 525-26 (O'Connor, J., concurring). In *Hodgson*, this Court found that the Minnesota restrictions unconstitutionally interfered with "family[ ] decisionmaking processes," 110 S. Ct. at 2950 (O'Connor, J., concurring), and failed to pass even rational basis review. *Id.* at 2945-47. Even when upholding that portion of the statute with a judicial bypass procedure, this Court carefully reconciled its ruling with past precedents. *Id.* at 2950-51 (O'Connor, J., concurring); *id.* at 2970 (Kennedy, J., concurring in part and dissenting in part) (plurality). Moreover, the Commonwealth's reliance on *Marks* is misplaced. *See* Representative Don Edwards, *et al.* Br. 8-9.

8 Respondents incorrectly cite *Harris v. McRae*, 448 U.S. 297 (1980), *Maher v. Roe*, 432 U.S. 464 (1977), and *Beal v. Doe*, 432 U.S. 438 (1977), to support their claim that the undue burden test has been regularly applied to review abortion regulations. R.B. 45. In these cases, this Court upheld funding schemes, applying rational basis review because the governments' decision to encourage childbirth over abortion "place[d] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *Harris*, 448 U.S. at 315. But those cases acknowledged that regulations that interfere with women's rights are subject to exacting scrutiny. *See Maher*, 432 U.S. at 472-73.

Similarly, *Bellotti v. Baird*, 428 U.S. 132 (1976), is distinguishable as it involved minors' access to abortion, an area in which this Court has permitted greater state regulation. To conclude from *Bellotti*'s casual use of the phrase "undue burden" in describing the holding in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), that this Court in *Danforth* intended to replace *Roe*'s strict scrutiny standard with a less protective standard of review strains credulity.

Under the undue burden test, heightened judicial scrutiny is reserved for only those instances in which the state imposes " 'absolute obstacles or severe limitations on the abortion decision.' " *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting)). By contrast, under *Roe*, any non-*de minimis* interference with the abortion right triggers strict scrutiny.[9] Absent a compelling purpose, both bans on abortion and restrictions—like those at issue here—that encumber the abortion choice with delay, administrative hurdles, or expense are invalid. *See* P.B. 17-18. In short, upholding the Pennsyl-

9 The right in *Roe*, like other fundamental rights, is not absolute. This Court has upheld numerous "regulations that have no significant impact on the woman's exercise of her right [and are] . . . justified by important state health objectives." *Akron*, 462 U.S. at 430. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 486-90 (1983) (plurality opinion); *id.* at 505 (O'Connor, J., concurring in part and dissenting in part) (requirement that tissue removed following abortion be submitted to pathologist); *Danforth*, 428 U.S. at 65-67, 79-81 (woman's written consent requirement, record-keeping requirement); *Connecticut v. Menillo*, 423 U.S. 9 (1975) (requirement that only physicians perform abortions). Additionally, this Court has upheld state laws regulating the performance of abortions after viability is possible. *Webster*, 492 U.S. at 513-20 (plurality opinion); *id.* at 525-31 (O'Connor, J., concurring) (viability testing requirement); *Ashcroft*, 462 U.S. at 482-86 (plurality opinion); *id.* at 505 (O'Connor, J., concurring in part and dissenting in part) (second physician must be present during post-viability abortions).

vania law under the less protective undue burden standard plainly entails overturning *Roe* by eviscerating its core principle.

B. The Doctrine of *Stare Decisis* Requires Reaffirmation of *Roe*.

This Court has recognized time and time again that the doctrine of *stare decisis* "is of fundamental importance to the rule of law." *Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 563 (1991) (quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)). Here, where there is the potential for disrupting the lives and settled expectations of millions of American women, it is beyond dispute that *stare decisis* applies with special force. P.B. 19-22. Astonishingly, while boldly advocating *Roe*'s demise, the Commonwealth and the Solicitor make only passing reference to this doctrine.

The Solicitor virtually ignores *stare decisis*, arguing in a brief footnote that it has less potency in constitutional cases. S.G. 8-9 n.4. But "even in constitutional cases, the doctrine carries such persuasive force that . . . departure from precedent [must] be supported by some 'special justification.' " *Payne v. Tennessee*, 111 S. Ct. 2597, 2618 (1991) (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). This Court has already concluded that *stare decisis* provides "especially compelling reasons" for continued adherence to *Roe*. *Akron*, 462 U.S. at 419-20 & n.1; *Thornburgh*, 476 U.S. at 759; *id.* at 780-81 (Stevens, J., concurring).

Similarly, the Commonwealth gives short shrift to *stare decisis*,[10] relying simply on this Court's overturning of *Lochner v. New York*, 198 U.S. 45 (1905), to justify overturning *Roe*. R.B. 115-16. However, *Lochner* is not remotely comparable to *Roe*. In overruling *Lochner*, this Court allowed

10 Both approaches to the resolution of this case advocated by the Commonwealth implicate *stare decisis*. As respondents concede, upholding Pennsylvania's biased counseling and 24-hour delay provisions without explicitly rejecting *Roe* would require this Court, at a minimum, to overrule *Akron* and *Thornburgh*. R.B. 40.

states to regulate the working conditions of employees. While this action upset some expectations of business owners and reduced their profits, it did not withdraw a right central to the ability of countless individuals to order and control their lives and destinies, a result that overruling *Roe* would entail. *See* Jeb Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 806 (1989) (laws upheld following *Lochner* era "did not involve the forced, affirmative occupation and direction of individuals' lives"). Moreover, while *Lochner* frustrated states' ability to protect workers from abusive working conditions, *Roe* protects women from state intervention that endangers their lives and health.[11]

For the past nineteen years, *Roe* has secured fundamental protection for private choices affecting millions of American women. The heavy burden of convincing this Court to destroy those settled expectations falls on those who propose this radical step. Both the Commonwealth and the Solicitor have utterly failed to meet their burden.

C. The Decision To Terminate or Continue a Pregnancy Must Continue To Be Afforded Fundamental Constitutional Protection.

The Commonwealth and the Solicitor premise their argument that the right to abortion must not be accorded fundamental status primarily on two assertions: abortion is not deeply rooted in the nation's history and traditions, R.B. 109, S.G. 9-12, and abortion is different from other privacy rights previously recognized by this Court. R.B. 109-10, S.G. 13 n.10. These arguments rest on an incomplete view of history and flawed legal analysis, and fail to distinguish *Roe*'s holding from a century of this Court's privacy decisions.

11 In addition, overruling *Lochner* resulted from the changed economic conditions of the 1930s. *See* Laurence H. Tribe, *American Constitutional Law* 578 (2d ed. 1988) ("it was the economic realities of the Depression that graphically undermined *Lochner*'s premises. . . . Positive government intervention came to be more widely accepted as essential to economic survival . . ."). In contrast, no changed social conditions justify overturning *Roe*. P.B. 31-34.

The Commonwealth and the Solicitor argue that abortion is not rooted in our nation's history and tradition, S.G. 10-11, R.B. 109, because statutes limiting abortion were common when the Fourteenth Amendment was ratified. The Solicitor's narrow focus on the historical treatment of abortion in the mid-nineteenth century, rather than the general historical protection of the right of privacy, is contrary to the historical analysis traditionally used to identify fundamental rights protected by the Fourteenth Amendment. *See Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J., concurring) ("the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available"). *See also id.* at 139 (Brennan, J., dissenting).[12]

Furthermore, in *Roe*, this Court undertook an extensive historical analysis and concluded that there was no long-standing tradition of laws proscribing abortion. 410 U.S. at 129-41. Indeed, as the Solicitor concedes, S.G. 10, at the time of the nation's founding and at common law,[13] abortion was

12 In cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court focused on the historic respect for privacy, rather than state laws prohibiting the use of contraceptives. Had this Court adopted the Solicitor's approach, the important rights recognized in these cases might not enjoy constitutional protection at all. *See Michael H.*, 491 U.S. at 139 (Brennan, J., dissenting). For although the first specifically anti-contraception statute was enacted in 1873, Comstock Act, ch. 258, § 1, 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. § 1461 (1988)), anti-obscenity statutes had been used decades earlier to prosecute those who disseminated contraceptive information. J. Reed, *The Birth Control Movement and American Society: From Private Vice To Public Virtue* 9 (1983).

13 *Amicus* American Academy of Medical Ethics purports to demonstrate that abortion was criminal at common law. Their brief fails, however, to cite even one early English common law case in which either a woman or an "abortionist" was criminally prosecuted for a successful, voluntary termination of pregnancy. Rather, the cases cited involved assaults that resulted in injury or death of a pregnant woman and her fetus, *see, e.g., Rex v. Lichefeld*, K.B. 27/974, Rex. m.4 (1505) (defendant charged as accessory to suicide, a felony killing), or the killing of a child born alive, which then, as now, was considered murder. *See, e.g., Regina v. Sims*, 75 Eng. Rep. 1075 (Q.B.

permitted until the time of quickening. *Roe*, 410 U.S. at 140-41; James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 3-19 (1978). The history elucidated by this Court in *Roe* has not changed since 1973.[14]

Finally, the state of the law in 1868 cannot define fundamental rights for all future generations.[15] As this Court emphasized in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966), "we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." *See also Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992) ("the Eighth Amendment's prohibition of cruel and unusual pun-

1601) (man who violently beat a pregnant women indicted for death of child who was born alive and then died due to injuries from the beating).

14 Moreover, historians now condemn as obsolete or illegitimate the major reasons for the adoption of anti-abortion laws in the nineteenth century: nativist fears, the movement to consolidate control over the medical profession, and fears about the rising status of women. Mohr, *supra*, at 37, 166-70. Contrary to the Solicitor's claim, S.G. 11 n.8, the racist and sexist justifications for the criminalization of abortion in the nineteenth century are constitutionally relevant. A legislative enactment motivated by a desire to discriminate on account of race or other constitutionally illegitimate basis is unconstitutional under the Equal Protection Clause, unless the state can prove that the law would have been enacted without the illegitimate factor. *Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985). This is so even where a statute is motivated by permissible as well as impermissible motives. *Id.* at 232. Although the Solicitor tries to downplay the presence of those illegitimate motives by citing the work of certain historians, S.G. 11 n.8, these works support, rather than refute, the argument made by *Amici* 250 American Historians in Support of Petitioners.

15 The Solicitor's use of 1868, rather than 1791 when the Bill of Rights was adopted, as the reference point for determining fundamental rights is not surprising since, in 1791, abortion was legal until quickening. *Roe*, 410 U.S. at 140-41. Were the requirements of due process to depend on the state of the law at the time of the framing of either the Fifth or Fourteenth Amendments, an individual might have fundamental rights guaranteed against interference by the federal government, but not against the states—an "unthinkable" result. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

ishments 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society' ") (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). To choose 1868 as the touchstone by which rights are validated is to state that many of our most unassailable rights are not "fundamental" at all.[16]

The Solicitor makes a second, equally disturbing claim. While conceding that pregnancy entails "profound physical, emotional, and psychological consequences," *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981) (plurality), and that the denial of safe, legal abortion will pose significant burdens on women, the Solicitor nonetheless urges this Court to turn its back on American women, callously insisting that this Court's constitutional jurisprudence does not protect women from governmentally imposed harms. The cases relied upon to support this preposterous argument, this Court's abortion funding cases, S.G. 14, are totally inapposite. In these cases, this Court upheld the government's refusal to subsidize abortion with public resources. Nothing in those cases suggests that the Constitution would permit the government similar license when it affirmatively prohibits or, as here, places onerous restrictions on the abortion choice.[17] Indeed, just this

16 Relying exclusively on what the fifty states have legislated in determining the scope of "liberty" would imperil numerous fundamental freedoms protected by this Court's decisions: the right to be free from racial segregation, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *Bolling*, 347 U.S. 497; the right to marry a person of another race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to live with a person of another race, *McLaughlin v. Florida*, 379 U.S. 184 (1964); the right to be free from forced sterilization, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right of married persons to use contraceptives, *Griswold*, 381 U.S. 479; the right of unmarried persons to use contraceptives, *Eisenstadt*, 405 U.S. 438; the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the right to court-appointed counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); the right of women to serve on juries, *Taylor v. Louisiana*, 419 U.S. 522 (1975); the right of poor people to vote, *Harper*, 383 U.S. 663; and the right to raise one's natural but illegitimate children, *Stanley v. Illinois*, 405 U.S. 645 (1972).

17 *E.g.*, *Harris v. McRae*, 448 U.S. at 317 n.19. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), and *Lindsey v. Normet*, 405 U.S. 56 (1972), are also cases involving failure to provide governmental assistance and are therefore also inapposite.

term, this Court recognized that governmentally imposed harms, less severe than those that forced pregnancy would entail, are unacceptable under our constitutional scheme. *Hudson*, 112 S. Ct. 995.[18]

Both the Solicitor and the Commonwealth further argue that a fundamental right to abortion does not flow logically from the long line of privacy cases relied upon by this Court in *Roe*. S.B. 13 n.10; R.B. 109-10. This argument misconstrues the nature of the privacy right in those cases, and fails miserably to distinguish them from *Roe*.

The common denominator of these and subsequent privacy cases is that personal decisions that profoundly affect bodily integrity and destiny are largely beyond the reach of government, and not, as the Solicitor suggests, "a recognition of the importance of the family." S.G. 13 n.10. Indeed, in *Carey*, Justice Brennan rejected precisely this reading of this Court's privacy decisions. Even though the Connecticut statute at issue in *Griswold* intruded into "the sacred precincts of marital bedrooms," 379 U.S. at 485, this Court held that *Griswold* was

> not dependent on that element . . . . *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.

18 *Amici* attack plaintiffs for "inflating" the number of women who died from illegal abortions. *See* American Ass'n of Prolife Ob/Gyn, *et al.* Br. 22. Considering the severe criminal penalties that were attached to abortion, it is not surprising that the figures for reported illegal abortion deaths cited by *amici* are lower than the estimates of actual deaths cited by petitioners. P.B. 32. But even by *amici*'s figures, almost 2300 women died from illegal abortion during the 1960s. Surely this demonstrates the catastrophic effects of criminal abortion laws and provides a graphic illustration of the Commonwealth's appalling "rights by numbers" approach, discussed more fully in Section II.B, *infra*.

Carey, 431 U.S. at 687. Moreover, contrary to the suggestion of *amici*, *see* U.S. Catholic Conference, *et al.* Br. 11, this Court did not err in *Eisenstadt* by finding that "personal interests alone—not relational interests . . . are entitled to special protection." On the contrary, as this Court explained in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

If accepted, the Solicitor's arbitrary dividing line in this Court's privacy jurisprudence might eliminate privacy protection for millions of Americans who are unmarried, separated, or divorced, or who live in "families" that are not recognized by the state. Not just the abortion right, but all aspects of individual privacy—including the right of bodily integrity, *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891), the right to privacy in one's home, *Stanley v. Georgia*, 394 U.S. 557 (1969), the right to use contraceptives, *Eisenstadt*, 405 U.S. 438; *Carey*, 431 U.S. 678, and the right to form alternative families, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)—might be jeopardized.

Similarly, the Solicitor's attempt to distinguish *Roe* on the ground that a "pregnant woman cannot be isolated in her privacy" misperceives this Court's privacy decisions. S.G. 13 n.10. The privacy right is not dependent on whether an individual is "isolated" in her privacy. Rather, it is a right, "as against the government . . . to be let alone" in making decisions of critical life importance. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The presence of the fetus thus does not change or undercut the "fundamental" nature of the privacy right. *Cf.* note 5 *supra*.[19]

The weakness of the Solicitor's contention that abortion is not a fundamental right is further evidenced by his wholly unsatisfactory effort to distinguish laws that prohibit abortions from those that compel them. The Solicitor contends "a

19 This reasoning also ignores the reality that no bright line exists between contraceptives and abortion, *see* Alan Guttmacher Institute, *et al.* Br. 28-45, and might impermissibly sanction a wide variety of incursions on the liberty of pregnant women. P.B. 40.

law *mandating* abortions would pose a starkly different issue" because our nation's legal traditions permit "a competent adult . . . to refuse medical care." S.G. 13 n.10 (emphasis in original). As noted by legal scholars, the Solicitor's position not only fails to distinguish compelled abortion from abortion restrictions, but "powerfully supports" *Roe*'s basic holding:

> A competent adult's decision to have an abortion in the early weeks is clearly a decision to "refuse unwanted medical intrusion." Compelled childbirth is a major medical event and far more dangerous than aborting an early pregnancy. . . . By denying women the right to elect early, medically simple abortion, and thereby forcing pregnant women to undergo childbirth, the United States government necessarily violates the principle that it concedes . . . : "competent adult[s] may generally refuse unwanted medical intrusion."

Walter Dellinger and Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. Pa. L. Rev. 83, 96-97 (1989).[20]

20 The Commonwealth disputes the propriety of remand should this Court overrule *Roe*. R.B. 53 n.21. But upon reversal, courts often remand to allow plaintiffs to pursue alternative claims not reached by the trial court, *see, e.g., Schweiker v. Gray Panthers*, 453 U.S. 34, 50 n.23 (1981), or where there has been a change in the law. *See, e.g., National Railroad Passenger Corp. v. Florida*, 929 F.2d 1532, 1537 (11th Cir. 1991). Where, as here, the trial court's decision was based on fully developed and as yet sound precedent, and "plaintiff[s] had little incentive to insist that the district court's written order also base liability on" their alternative theories, equitable principles demand a remand. *Carter v. Sedgwick County*, 929 F.2d 1501, 1505 (10th Cir. 1991) (remand to consider alternative claims was proper where decision was reversed in light of subsequent Supreme Court decision). Moreover, disputes regarding whether plaintiffs should be allowed to pursue alternative claims on remand are best resolved by the lower courts. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 146 (1977). Finally, the Solicitor's contention that petitioners opted not to challenge § 3204(c) (prohibiting abortions based on the sex of the fetus) because they believe it is constitutional, S.G. 18 n.13, is simply wrong. While petitioners believe this provision violates *Roe*, it obviously could only be challenged by a plaintiff who could satisfy Article III's standing requirement. Thus, a challenge remains a future possibility.

II. THE PENNSYLVANIA STATUTE IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW.

A. The Factual Findings of the District Court Are Relevant to the Constitutional Issue Before This Court and Are Fully Supported by the Factual Record.

The Commonwealth cannot carry the extraordinary burden of proving that the district court's factual findings are "clearly erroneous" under Federal Rule of Civil Procedure 52(a). This Court has held:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) (citations omitted). Here, where the trial court's findings of fact are based heavily on weighing the credibility of witness testimony, "Rule 52(a) demands even greater deference to the trial court's findings . . . ." *Id.* at 575. *See also Hernandez v. New York*, 111 S. Ct. 1859, 1868-70 (1991) (plurality).[21]

The district court carefully documented the record evidence supporting each of its 387 findings of fact. The court of appeals did not reverse any of the district court's factual findings,[22] and the Commonwealth cannot justify challenging

21 The district court specifically found that the testimony of each of petitioners' nine expert and fact witnesses was "credible in all respects." 115a, 117a-124a. However, the district court made adverse credibility determinations against two of the three witnesses offered by the Commonwealth, and found that the testimony of marriage counselor Vincent Rue was simply "not credible." 127a. Certain of the Commonwealth's *amici* continue to rely on the discredited testimony of the Commonwealth's witnesses, particularly that of Vincent Rue, but the Commonwealth itself does not challenge the district court's credibility determinations in any respect.

22 Both the Commonwealth, R.B. 8 n.5, and *amici*, *see* Nat'l Legal Found. Br. 27 n.13, claim that the court of appeals overturned some of the district court's factual findings on appeal. However, reference to the cited pages of the court of appeals opinion in fact reveals no instance where the court of appeals declared any finding clearly erroneous. Typically, the cited portions of the court of appeals opinion do not even mention the district court's findings. *See, e.g.*, 38a-40a, 83a.

a single factual finding under the clearly erroneous standard.[23] Thus, for purposes of this appeal, the district court's findings must be accepted by this Court. P.B. 4 n.6.

Perhaps recognizing the futility of challenging the district court's findings, *amici* argue that facts are irrelevant in a facial constitutional challenge, because plaintiffs "must prove that the statute cannot be constitutionally applied to *anyone*." S.G. 19 (emphasis in original); *see also* Nat'l Legal Found. Br. 3-5, 27-28. *Cf.* R.B. 92. For this claim *amici* rely on *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2980-81 (1990), *United States v. Salerno*, 481 U.S. 739, 745 (1987), and *Webster*, 492 U.S. at 524 (O'Connor, J., concurring). Each of these cases involved speculative challenges to the possible application of statutory provisions in the absence of factual support, and only held that facial challenges cannot succeed "based upon a worst-case analysis that may never occur." *Akron Center*, 110 S. Ct. at 2981. By contrast, far from raising remote or speculative claims based on a worst-case scenario, the record here demonstrates that, if enforced, the Act will severely harm women.

In facial challenges, this Court has always looked beyond the four corners of the statute to consider the

23 The Commonwealth insists that it "continue[s]" to challenge the district court's findings of fact, R.B. 8, but its brief reveals *no* instance where the Commonwealth even attempts to show that any particular finding was clearly erroneous. For example, the district court found that trained counselors are capable of providing to patients the information necessary for obtaining informed consent. 175a. The Commonwealth complains that this finding "simply represent[s] [the district court's] own disagreement with the considered judgment of the legislature," R.B. 66, but does not—and cannot—suggest why this finding is clearly erroneous under Rule 52(a). The Commonwealth also argues that the district court erred in failing to make certain *additional* findings. But unless the Commonwealth properly challenges the district court's findings, it is immaterial that it might have made other findings as well.

facts.[24] In *Hodgson*, for example, the Court relied extensively on the factual findings of the district court in striking down Minnesota's requirement of two-parent notification without a bypass option, a provision that had never been in effect and was challenged on its face. *See Hodgson*, 110 S. Ct. at 2938-41, 2945-46; *id.* at 2950 (O'Connor, J., concurring).

Furthermore, adoption of *amici*'s position would effectively preclude all facial challenges and prevent federal courts from scrutinizing legislative findings offered to justify an infringement of constitutional rights.[25] As Justice Thomas recently recognized:

> We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by "finding" that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison*, 1 Cranch 137 (1803), that has not been the law.

Lamprecht v. FCC, No. 88-1395, 1992 U.S. App. LEXIS 1997, at *30 n.2 (D.C. Cir. Feb. 19, 1992).

B. This Court Should Reject the Commonwealth's "Rights by Numbers" Approach and Find Unconstitutional the Husband Notification Provision.

The Commonwealth does not contest the conclusion reached by both lower courts that forced husband notification will impose on some women seeking abortions a wide array of "dire consequences," completely frustrating the abortion decision of some and endangering the lives and

24 *See, e.g., Ashcroft*, 462 U.S. at 483-86 (citing physician testimony); *Akron*, 462 U.S. at 434-37 (multiple references to statistical studies and medical association standards and guidelines); *Colautti v. Franklin*, 439 U.S. 379, 395-96, 398-99 (1979) (citing physician testimony); *Danforth*, 428 U.S. at 75-79 (relying on record evidence).

25 *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978).

health of others.[26] *See* 66a-70a & n.26; 255a-257a & n.42.[27] Nor does it seriously offer a legitimate state interest to support the statute.[28] Instead, the Commonwealth claims that only a "very small" number of women will suffer health consequences and that it is not enough in a facial challenge "to show that [a statute] may deter or inhibit *some* women from getting an abortion." R.B. 83, 85 (emphasis in original). In the Commonwealth's view, the Constitution only protects

26 Citing Justice Stevens' concurrence in *H.L. v. Matheson*, 450 U.S. 398, 423-24 (1981), the Commonwealth contends that the courts below unfairly assumed that either a marriage is so perfect that communication will routinely occur, or it is so imperfect that forced communication will always be harmful. *See* R.B. 93-96. But the lower courts, following this Court's decision in *Hodgson*, 110 S. Ct. at 2945, simply made the common sense observation that the statute serves no purpose for the vast majority of women who voluntarily discuss the abortion decision with their husbands, and therefore must be evaluated based on its impact on women who would otherwise not notify their husbands. *See* 66a, 193a, 261a. As the district court found, in this context, forced husband notification *dis*serves any legitimate state interest. *See* 201a, 262a.

27 The Commonwealth's asserted distinction between husband notice and consent statutes, R.B. 93 n.38, is conclusively refuted by the holdings of this Court and the record in this case. A notice provision can give the husband effective veto power over the woman's decision, preventing the abortion or penalizing her for exercising her choice. *See Hodgson*, 110 S. Ct. at 2939, 2945 & n.36; *Bellotti v. Baird*, 443 U.S. 622, 647 (1979). *See also* 69a; 256a. That the retaliation comes not from the state but from the husband does not exonerate the state. As Justice Harlan wrote for a unanimous Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958): "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold."

28 Raw paternalism informs the arguments of the *amici* who support husband notification. One brief describes a woman who obtains an abortion without first notifying her husband as one who "considers herself 'liberated,' " or who is a "highly dominant, independent wife who is not in touch with her emotions," or "who makes a hasty, impulsive decision." *See* Rutherford Inst. Br. 13. 15. The Solicitor argues that husband notification will preserve "marital integrity," albeit not "marital accord." S.G. 25. The district court's unrefuted findings that forced husband notification could destroy marriages and subject women to physical abuse, *see* 201a, 262a, make plain that the statute's only purpose is to further the husband's ability to control his wife's behavior.

American women from legislation that will result in dire consequences to their lives and health, if all, or at least the vast majority of, women are affected.

The Commonwealth's effort to defeat the constitutional rights of entire classes of women surely must fail.[29] This Court has repeatedly recognized that rights under the Fourteenth Amendment are "personal ones" that cannot "depend on the number of persons who may be discriminated against." *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151, 161-62 (1914).[30] To accept the Commonwealth's view that a proportionately small class of women may be singled out might justify a wide range of prohibitive restrictions on abortion, including, for example, bans on abortion for Hispanic or Asian women, women under 16 or over 35, or an absolute ban on all second trimester saline abortions.[31] *See Danforth*,

29 The contention that the numbers of women affected is "very small" is itself highly questionable. The statute affects all married women, who comprise at least twenty percent of the approximately 50,000 women who obtain abortions in Pennsylvania each year. 149a. Even by Judge Alito's calculations, had the notification requirement been in effect in Pennsylvania during the 1980s, 8500 women could have been affected. *See* 92a & n.3; 149a. *Amicus* State of Utah claims that its husband notification requirement has had no ill effects, *see* Utah Br. 18-19, but this very provision is currently subject to litigation. *Jane L. v. Bangerter*, No. 91-C-345-G (D. Utah filed Apr. 4, 1991). The self-serving claims of the Attorney General charged with defending this statute are hardly entitled to great weight, especially where, as here, there are declarations to the contrary.

30 This Court certainly would not sanction state statutes that prohibit flag burning in protest, *Texas v. Johnson*, 491 U.S. 397 (1989), or advocating the use of violence as a means of accomplishing political reform, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), even though very few people engage in such activities. Nor could a state prohibit from voting any member of the Armed Forces who moves from another state for military duty, *Carrington v. Rash*, 380 U.S. 89 (1965), or disqualify ministers or priests from serving as state legislators, *see McDaniel v. Paty*, 435 U.S. 618 (1978), because only a few would feel the weight of these restrictions. Surely, this Court's holding in *Meyer v. Nebraska*, 262 U.S. 390 (1923), invalidating a state statute prohibiting the teaching of German language in private schools, would not have been different if only a small number of German immigrants lived in Nebraska.

31 Attempting to provide a limit to its argument, the Commonwealth suggests that *Hodgson* presented a case where a sufficiently large percentage

428 U.S. at 75-79. This "rights by numbers" approach is particularly inappropriate here, where the constitutional right to abortion is premised on the right of the individual to make autonomous decisions about critical life issues.[32]

Just as it tries to downplay the number of women harmed by forced husband notification, the Commonwealth attempts to shore up the obviously inadequate statutory exceptions.[33] Ignoring all of the statute's defects save one, *compare* P.B. 41-43, the Commonwealth focuses exclusively on the district court's finding that battered women will be psychologically incapable of availing themselves of the statutory exceptions to forced husband notification. *See* 201a. The Commonwealth concedes, as it must, the validity of this finding, *see* R.B. 88-90, but speculates, without evidence, that women will be too victimized to seek out abortions in the first place. *Id.* at 90. This Court must reject the Commonwealth's insulting and unacceptable view that women are either too independent

of women were affected to raise constitutional concerns. *See* R.B. 85. But the percentage of women seeking abortions under the age of 18 is only 12%, *see* 150a, far less than the proportion who are married.

32 The Commonwealth ignores altogether the provision's interference with marital integrity and a woman's autonomy. In violation of the right of marital integrity, § 3209 subjects marital discussions to state surveillance and control. P.B. 44-45. Additionally, by forcing women to obtain counsel from their husbands, the notification requirement strikes at the core of the right of privacy by denying women the ability to make critical life choices independently. As this Court recognized in *Danforth*, 428 U.S. at 69 n.11:

> the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental interference into matters so fundamentally affecting a person as the decision whether to bear or beget children.

Id. (quoting *Eisenstadt*, 405 U.S. at 453) (emphasis in original).

33 The Commonwealth tries to distinguish *Hodgson* on the basis that the exceptions there could trigger parental notification, *see* R.B. 87. However, the spousal sexual assault exception can operate in precisely the same fashion—a point the Commonwealth simply ignores. P.B. 42.

to require constitutional protection, or too oppressed to benefit from it.[34]

C. The Biased Counseling Provisions Will Harm Women and Force Physicians To Disseminate Pennsylvania's Anti-abortion Ideology.

1. The biased counseling provisions interfere with the provision of appropriate medical care.

The Commonwealth argues that the Act's biased counseling provisions must be upheld because the Constitution does not forbid state informed consent laws from requiring the provision of specific information to all patients without regard to their medical neeeds. R.B. 63. But this Court has twice rejected this view, finding that nearly identical statutory schemes failed for two independent reasons. In conflict with accepted medical practice, the schemes "intrude upon the discretion of the pregnant woman's physician," by requiring that a "specific body of information be given in all cases,

34 Citing *Geduldig v. Aiello*, 417 U.S. 484 (1974), *amici* contend that § 3209 does not deny women equal protection, because discrimination based on pregnancy is not sex-based. *See, e.g.*, S.G. 26 n.25; Life Issues Inst. Br. 6. Unlike the exclusion of pregnancy from the disability program at issue in *Geduldig*, where the "fiscal and actuarial benefits [of the exclusion] accrue[d] to both sexes," 417 U.S. at 496 n.20, the forced husband notification requirement here gives a right to a class comprised entirely of men. Marriage carries with it for men and only men the right to notification of their wives' reproductive choices. *Cf. International Union, U.A.W. v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1202 (1991) ("Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job"); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). Here, where the Commonwealth has refused to impose spousal notification requirements on husbands who obtain surgical procedures altering their reproductive capacity, 199a, the discrimination is particularly invidious. *See Kirchberg v. Feenstra*, 450 U.S. 455, 459-61 (1981). Moreover, unlike the program in *Geduldig*, § 3209 does not merely fail to provide benefits in the event of pregnancy, but imposes new and potentially dangerous obligations on pregnant women. *Cf. Satty*, 434 U.S. at 142 (recognizing distinction between refusing to extend to women a benefit that men do not receive and imposing a burden upon women that men need not suffer).

irrespective of the particular needs of the patient." *Thornburgh*, 476 U.S. at 762, *see also Akron*, 462 U.S. at 445. They also force physicians to exploit the trust of their patients by disseminating irrelevant, inflammatory, misleading, and inaccurate information that discourages abortion. *Thornburgh*, 476 U.S. at 763. The state's real purpose is to send an ideological message to women,[35] and the Commonwealth concedes that the provisions will have their intended effect. R.B. 69-70, S.G. 21.[36] The biased counseling provisions will result in disastrous consequences for women's health, P.B. 8-9, 50-53, subjecting them to "undesirable and unnecessary anxiety, anguish and fear," 178a; *see also* J.A. 135,[37] and furthering no legitimate state interest. They are therefore invalid.

In a feeble attempt to justify these burdens, the Commonwealth claims that petitioners already provide all of the man-

35 If the state enacted a law requiring a physician to provide all women who decided to continue their pregnancies to term with a list of agencies providing abortion services; information about the availability of medical assistance for abortion; the fact that the woman's male partner may be liable to pay for the abortion; and the complete medical risks of both procedures, even when the woman has already chosen to carry the pregnancy to term, the Act's ideological bias would be obvious. The same is true with the Pennsylvania statute.

36 Although conceding that the Act "may dissuade some women" from their abortion choice, both the Commonwealth and the Solicitor claim that this is constitutionally irrelevant because the statute serves the legitimate interest in encouraging childbirth over abortion. S.G. 21; R.B. 69-70. Unlike the denial of abortion funding, which does "not add any 'restriction on access to abortion that was not already there,' " *Akron*, 462 U.S. at 444 n.33 (quoting *Maher*, 432 U.S. at 474), the State's interest in encouraging childbirth over abortion cannot justify "substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity." *Hodgson*, 110 S. Ct. at 2937 (opinion of Stevens, J.).

37 The exemption provided in § 3205(c), where the physician can demonstrate that providing the mandated information would result in a "severely adverse effect on the physical or mental health of the patient," 291a, is wholly inadequate to protect women's health. Women who suffer damage to their health that falls short of a "severely adverse effect" are left totally unprotected.

dated information. R.B. 59, 68-69. But, as evidence amassed at trial shows, absent statutory mandate, abortion providers would not inform *all* women seeking abortions about the availability of child support payments and medical assistance benefits if a woman carries to term, nor show them pictures and a description of fetal development. J.A. 252-53, 258. Nor would petitioners provide options counseling or a complete discussion about the many medical risks of carrying a pregnancy to term to those women who have already obtained this counseling or who clearly indicate that their decision to choose abortion is firm. 138a, 142a, 146a, J.A. 140-41.[38] Although petitioners, consistent with medical standards, offer accurate and appropriate information and referral of the type mandated by the Act to some women, some of the time, J.A. 258, 266-67, this cannot be equated with § 3205's requirement that physicians offer state-prescribed information in all cases, irrespective of the needs of the patient.

2. The biased counseling required by § 3205 is not commercial speech.

The Commonwealth does not dispute that the biased patient counseling provisions compel speech, or that state compulsion of speech is "a content-based regulation of speech," and is therefore "subject to exacting First Amendment scrutiny," *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 795, 798 (1988). Nor does it dispute that the provision cannot possibly survive this test. Instead, the Commonwealth argues that the physician-patient dialogue falls outside the ambit of the First Amendment because it is "commercial" speech. *See* R.B. 70-71.

This Court, however, has long eschewed reliance on "mere labels" for determining the level of constitutional protection under the First Amendment. *NAACP v. Button*, 371 U.S.

38 Abortion providers would not refer their patients to many of the crisis pregnancy centers on the state-approved list, since these centers often provide women with inflammatory, misleading, and inaccurate information about abortion. J.A. 256. *See also* 169a.

415, 429 (1963). *See also Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). In fact, this Court has consistently limited commercial speech to expression that does no more than "propose a commercial transaction." *Board of Trustees v. Fox*, 492 U.S. 469, 473 (1989) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). By contrast, the "right of the doctor to advise his patients according to his best lights seems so obviously within [the] First Amendment . . . as to need no extended discussion." *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting).[39] That the physician is paid for her advice "is as immaterial in this connection as is the fact that newspapers and books are sold." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). *See also Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991). Like the abortion advertisement in *Bigelow*, the mere "relationship of speech [between a doctor and patient] to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Bigelow*, 421 U.S. at 826.

Moreover, even if physicians' speech were commercial in part, as the Commonwealth contends, "it is inextricably intertwined with otherwise fully protected speech," namely, the informed consent dialogue that is at the heart of protected professional expression, and therefore no longer "retains its commercial character." *Riley*, 487 U.S. at 796. "[W]e cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression." *Id.* Thus, *Riley* is controlling here.

Finally, even in cases involving "pure" commercial speech, this Court has recognized that "unjustified or unduly burden-

39 The court of appeals erred in suggesting that petitioners conceded at oral argument that the speech at issue was "commercial." The First Amendment issues were never discussed at oral argument, *see* Appendix A for the full discussion of § 3205, and petitioners' briefs took exactly the contrary position. *See* Brief of Appellees at 33-36, *Casey v. Planned Parenthood*, No. 90-1662.

some disclosure requirements" may not be used to " 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.' " *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). In *Zauderer*, the Court upheld a non-criminal reprimand for an attorney who deceived and misled potential clients by failing to disclose in a paid advertisement "purely factual and uncontroversial information about the [financial] terms under which [the] services will be available." *Zauderer*, 471 U.S. at 651-53. In this case, by comparison, the Commonwealth, on pain of criminal penalties, forces all abortion providers to disclose often inaccurate and misleading information designed, as the Commonwealth admits, to discourage abortion and encourage childbirth in all but "the most urgent circumstances." R.B. 69-70. By compelling physicians to deliver this anti-abortion message,[40] the statute forces the "individual . . . to be an instrument for fostering public adherence to an ideological point of view he [or she] finds unacceptable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Thus, the Act violates the First Amendment.

40 Imagine, for example, that the state enacted a criminal statute that required an attorney, before agreeing to represent a civil rights plaintiff, to advise the potential client (1) that alternatives to litigation, such as letting the matter drop, ignoring the abuse, or settling the matter for a nominal sum, may be preferable to litigation; (2) that a state-prepared list of agencies able to assist the person in avoiding litigation is available; (3) that the defendant may assume legal fees or that free legal services may be available in the event of settlement; and (4) to ensure proper consideration of the weighty effort the client is about to undertake, that the client must return to the lawyer's office on a second occasion, even if the delay will push the client past the deadline for the statute of limitations on some of his or her claims. There can be little doubt that such a poorly disguised attempt to discourage civil rights suits would interfere with the attorney-client relationship and would violate the First Amendment. *Cf. NAACP v. Button*, 371 U.S. at 429-30, 434-37.

D. The Judicial Bypass Procedure Does Not Cure the Constitutional Defects of the Act's Informed Parental Consent Provision.

The Commonwealth does not challenge the district court's finding that the Act's "informed" parental consent provision mandates face-to-face counseling for parents,[41] and thereby impermissibly burdens privacy rights, nor does it suggest that any legitimate state interest supports this requirement. *See also* P.B. 55-57. Instead, relying exclusively on *Hodgson*, the Commonwealth argues that these defects are cured by the presence of a judicial bypass procedure. *See* R.B. 80.

Reliance upon *Hodgson* is misplaced. In *Hodgson*, this Court held that Minnesota's two-parent notification statute interfered with rights of familial integrity.[42] Since only half of the minors in Minnesota reside with both biological parents, this Court recognized that the statute fails to "serve the purposes asserted by the state"—parental involvement—"in too many cases." *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring).

Nevertheless, this Court held that the bypass procedure is the appropriate mechanism to cure the defect in the statute. As Justice Kennedy recognized:

> If one were to attempt to design a statute that would address the Court's concerns, one would do precisely what Minnesota has done . . . : create a judicial mechanism to identify, and exempt from the strictures of the law, those cases in which the minor is mature or in which notification of the minor's parents is not in the minor's best interests.

41 Contrary to the claims of Nat'l Legal Found. Br. 17-18, the undisputed testimony at trial showed that face-to-face counseling was indeed required. *See* 248a n.38. Petitioners' witnesses, *see* J.A. 133-34, 151, 163-64, as well as the Commonwealth's expert testified that a face-to-face meeting is necessary. *See* J.A. 354; *see also* 170a-171a.

42 As the evidence in *Hodgson* demonstrated, where the second parent has no interest in nor relationship with his daughter or where there is a history of abuse between the parents, compelling the involvement of the second parent can have disastrous effects. *Hodgson*, 110 S. Ct. at 2945.

Id. at 2970 (Kennedy, J., concurring in part and dissenting in part) (plurality opinion).

In contrast, both the purpose of the Pennsylvania law and its constitutional defect are entirely different. Pennsylvania's purpose is not solely to encourage parental involvement and approval—that purpose could be accomplished by a simple parental/judicial consent provision. Rather, Pennsylvania mandates that a parent obtain the information designed to discourage abortion in a face-to-face meeting with the physician. If a parent consents to her daughter's abortion but refuses to accompany her to the doctor's office, or if the parent cannot change work or family commitments to meet the physician in person, P.B. 11-12, 56-57, the daughter is forced to obtain judicial authorization for the abortion. But in this instance, the judicial bypass procedure is simply not designed to cure the constitutional defect. The bypass judge cannot ensure that the parent will obtain the information. In most instances, unless subpoenaed, the parent will not even attend the hearing.

Moreover, acceptance of this odious proposition may enable a state to place any restriction on a young woman's right to abortion, however irrational, so long as there was a judicial bypass that could exempt them from the mandate. For example, a state could require young women to obtain consent from complete strangers or require them to have the abortion in a hospital under general anesthesia. If a judicial bypass procedure will cure absolutely anything, then the right to abortion, whether viewed as a "fundamental" right, or as "a component of" the "liberty" guaranteed by the Constitution, *Hodgson*, 110 S. Ct. at 2951 (Marshall, J., concurring in part and dissenting in part); *id.* at 2936 (opinion of Stevens, J.); *id.* at 2949 (O'Connor, J., concurring), would be completely repudiated.

CONCLUSION

In the days before *Roe*, thousands of women lost their lives, and even more were subjected to physical and emotional scars from back-alley and self-induced abortions directly resulting from criminal prohibitions on abortion. Understanding the severe restraints on women imposed by these laws, this Court in *Roe* recognized that the right to make childbearing decisions was a protected liberty of fundamental dimension. Mindful that abandonment of these principles may again subject women to these horrors, petitioners urge this Court to reaffirm *Roe*, *Akron*, and *Thornburgh*, reverse the judgment of the court of appeals in No. 91-744 and affirm the judgment of the court of appeals in No. 91-902.

Respectfully submitted,

LINDA J. WHARTON
CAROL E. TRACY
Women's Law Project
125 South Ninth Street
Suite 401
Philadelphia, PA 19107
(215) 928-9801

SETH KREIMER
University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-7447

ROGER K. EVANS
EVE W. PAUL
DARA KLASSEL
Planned Parenthood Action
Fund, Inc.
810 Seventh Avenue
New York, NY 10019
(212) 541-7800

KATHRYN KOLBERT
(Counsel of Record)
JANET BENSHOOF
LYNN M. PALTROW
RACHAEL N. PINE
ANDREW DWYER
ELLEN K. GOETZ
STEVEN R. SHAPIRO
JOHN A. POWELL
American Civil Liberties
Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

Attorneys for Petitioners and Cross-Respondents

APPENDIX

TRANSCRIPT OF ORAL ARGUMENT
BEFORE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

February 25, 1991

* * *

BY MS. KOLBERT:

* * *

[63] Let me quickly just turn to the 24-hour doctor-only requirements in 3205 and say that our argument is extremely straightforward, Akron, Thornburgh apply, the Court has not changed that standard and; therefore, this Court is bound by those precedents.

[64] The Commonwealth has tried a couple of times to distinguish this case from Thornburgh. We believe that their efforts are without merit. They argue that Thornburgh can't control because the Commonwealth didn't have a chance to put on its facts on Thornburgh, but the Supreme Court answered that argument when it rendered its decision and said that facts would make no difference to their ruling.

The second thing they said is, but the Judge didn't listen to the facts the way we wanted him to listen to it, again the clearly erroneous standard is what is applicable and the Judge's findings in our view, and I'm hoping yours, whether they were not clearly erroneous.

THE COURT: They also say this was in the era of compelling state interest. The least restrictive means, don't they?

MS. KOLBERT: That's right. But we contend that it is still that era; and therefore, this Court is bound by that precedent.

Lastly, as Judge Stapelton, as you noted, the court made pains to distinguish in the discussion in Hodgson about the 48-hour waiting period, that for the women, the Court sided with the approval and this was an opinion by Justice O'Connor and Justice Stevens, [65] they sided with the approval the majority opinion in Akron so clearly they had to have viewed

that the situation as applied to adult women was still being judged under that more stringent standard.

* * *